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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

* * *

NO. 75-1164

* * *

MARY FRANCIS VICKERY,

Petitioner

V.

W. J. ESTELLE, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

* * *

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For
The Fifth Circuit

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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BLEED THROUGH

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* * *

JURISDICTION

The Petition appears to have been timely filed and to meet this Court's formal jurisdictional requirements. Respondent denies, however, that the criteria of Supreme Court Rule 19 governing the exercise of this Court's discretionary certiorari jurisdiction have been met.

QUESTION PRESENTED

The sole question presented by the instant Petition is whether it is so certain that the Texas Court of Criminal Appeals would reject Petitioner's application

for the writ of habeas corpus in that court that she is relieved of the exhaustion requirement of 28 U.S.C. § 2254(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by Petitioner, this Petition involves the provisions of 28 U.S.C. § 2254(b), to wit:

> An application for the writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

STATEMENT OF THE CASE

Respondent concurs in Petitioner's statement of the case.

ARGUMENT

A number of the Courts of Appeals have held that the exhaustion requirement of 28 U.S.C. § 2254(b) will not bar a federal habeas corpus applicant from presenting his or her claim without first resorting to the state courts if recent and unequivocal rulings of the highest court of the state make perfectly apparent the futility of presenting the applicant's claim to the state forum. *See, e.g., Mercado v. Rockerfeller*, 502 F.2d 666 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *Layton v. Carson*, 479 F.2d 1275 (5th Cir. 1973); *Allen v. Perini*, 424 F.2d 134 (6th Cir. 1970). This Court as well has apparently recognized such an exception to the

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exhaustion requirement. *See Spencer v. Texas*, 395 U.S. 554 (1967), *aff'g Reed v. Beto*, 343 F.2d 723 (5th Cir. 1965). Petitioner herein claims that her case falls within the exception; Respondent submits that it does not.

It is not necessary for Respondent to argue Petitioner's case for the granting of the writ in order to prevail in its contention that exhaustion is necessary. If there is *any doubt* about the outcome of a state habeas corpus proceeding, Petitioner must afford the state courts an opportunity to consider her claim. Even the unlikelihood of success in the state court cannot excuse a failure to exhaust available state remedies. *Johnson v. Robinson*, 166 U.S. App. D.C. 62 (D.D.C. 1974); *Daegle v. Crouse*, 429 F.2d 503, 505 (10th Cir. 1970), *cert. denied*, 400 U.S. 1010 (1971); *Lucas v. Michigan*, 420 F.2d 259 (6th Cir. 1970); *Whiteley v. Meacham*, 416 F.2d 36 (10th Cir. 1969), *rev'd on other grounds sub nom. Whiteley v. Warden*, 401 U.S. 560 (1971); *Boyd v. Oklahoma*, 375 F.2d 481 (10th Cir. 1967); *Dana v. Tracy*, 360 F.2d 545 (1st Cir.), *cert. denied*, 385 U.S. 941 (1966).

Petitioner places principal reliance on *Ex Parte Francis*, 510 S.W.2d 345 (Tex. Crim. App. 1974), a case that she contends is identical to her own. Francis sought a writ of habeas corpus with the argument that an eight year delay between the affirmance of his conviction and the date on which he was arrested and began serving his sentence violated his right to due process of law. The Court of Criminal Appeals denied his petition, observing *inter alia* that Francis learned of the affirmance of his conviction soon after it was issued, but did not return to court or surrender himself to the authorities. *Id.* at 346-47. Hence Respondent argued in the district court and Court of Appeals below that Petitioner, who had no knowledge that her conviction had been affirmed, stands in a fundamentally different

position than did Francis and cannot conclude on the basis of *Ex Parte Francis* that the Court of Criminal Appeals would be bound to deny her application. Both courts agreed with Respondent's contention.

Petitioner now seeks to invoke a later decision of the Court of Criminal Appeals as a basis for establishing the futility of presenting her claim to that tribunal. In *Ex Parte Esquivel*, 531 S.W.2d 339 (Tex. Crim. App. 1976), the applicant had been simultaneously sentenced to a five year term for a robbery conviction and a life term for a murder conviction. He appealed the murder conviction and began to serve his sentence for the robbery. His murder conviction was affirmed but the mandate directing the execution of the judgment was misplaced and the affirmance was never communicated to the prison authorities or to Esquivel. Consequently, he was released after about three years of confinement. During the next ten years, Esquivel was in and out of prison twice on unrelated offenses, but (like Petitioner herein) was never informed of the affirmance of his murder conviction and never served any of the life sentence. Thirteen years after the life sentence was imposed, Esquivel was arrested and forced to begin serving it. On his application for habeas corpus relief, the Court of Criminal Appeals declined to relieve him altogether of the obligation to serve the life sentence, *but ordered that he be given credit on that sentence for all the time that had elapsed since the date of sentencing* (*not* merely for the time that he had actually been in prison during that period). Petitioner argues that the Court of Criminal Appeals' refusal to void Esquivel's sentence altogether signifies that her application to that court would surely fail. In fact, *Ex Parte Esquivel* betokens very good prospects for Petitioner's remedies in state court, for if Petitioner should be granted the same relief as was afforded Esquivel she would be free. Petitioner's

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sentence was for three years; more than nine years have now passed since her sentence was imposed. Hence, awarding her credit for time served as though she had been confined since the date of sentencing, the remedy the Court of Criminal Appeals fashioned for Esquivel, would result in her immediate discharge.

Respondent therefore submits that Petitioner's prospects before the Texas Court of Criminal Appeals are at best promising and at worst uncertain. Her own decision to circumvent state procedures has prevented that court from deciding the question that she seeks to bring to the federal courts. This Court ought not encourage Petitioner or other habeas corpus applicants to make such choices.

CONCLUSION

For all the reasons stated above, and for the further reason that the criteria set forth in Supreme Court Rule 19 governing the exercise of this Court's discretionary certiorari jurisdiction have not been met, Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of Texas, do hereby certify that three copies of the above and foregoing Respondent's Brief in Opposition have been served by placing the same in the United States Mail, postage prepaid, certified, on this the _____ day of May, 1976, addressed as follows: John F. Jordan, 2818 Maple Avenue, #103, Dallas, Texas, 75201.

_____
JOE B. DIBRELL, JR.